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UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN JOSE DIVISION

IRWIN BERKOWITZ, Derivatively on Behalf  
 of Nominal Defendant AFFYMETRIX, INC.,

Plaintiff,

v.

STEPHEN P.A. FODOR, SUSAN E. SIEGEL,  
 BARBARA A. CAULFIELD, GREGORY T.  
 SCHIFFMAN, RONALD D. VERDOORN,  
 EDWARD M. HURWITZ, VERNON A.  
 NORVIEL, KENNETH J. NUSSBACHER,  
 RICHARD PRAVA, JOHN A. YOUNG,  
 DAVID B. SINGER, VERNON R. LOUCKS,  
 JR., JOHN D. DIEKMAN and PAUL BERG,

Defendants,

and,

AFFYMETRIX, INC.

Nominal Defendant.

Case No.

C06-05353

**SHAREHOLDER DERIVATIVE  
 COMPLAINT**

**JURY TRIAL DEMANDED**

1 Plaintiff, by his attorneys, submits this Derivative Complaint (the "Complaint") against the  
2 defendants named herein.

3 **NATURE AND SUMMARY OF THE ACTION**

4 1. This is a shareholder's derivative action brought for the benefit of nominal  
5 defendant Affymetrix, Inc. ("Affymetrix" or the "Company") against certain members of its Board  
6 of Directors (the "Board") and certain of its executive officers seeking to remedy defendants'  
7 breaches of fiduciary duties, unjust enrichment, statutory violations, and other violations of law.

8 2. In gross breach of their fiduciary duties as officers and/or directors of Affymetrix,  
9 the Individual Defendants (as defined herein) colluded with one another to:

- 10 (a) improperly backdate dozens of grants of Affymetrix stock options to Affymetrix  
11 Chief Executive Officer Stephen P. A. Fodor and several other Affymetrix  
12 executives, in violation of the Company's shareholder-approved stock option plans;  
13 (b) improperly record and account for the backdated stock options, in violation of  
14 Generally Accepted Accounting Principles;  
15 (c) improperly take tax deductions based on the backdated stock options, in violation of  
16 Section 162(m) of the Internal Revenue Code;  
17 (d) produce and disseminate to Affymetrix shareholders and the market false financial  
18 statements and other SEC filings that improperly recorded and accounted for the  
19 backdated option grants and concealed the improper backdating of stock options.

20 3. As a result of the Individual Defendants' egregious misconduct, Affymetrix has  
21 sustained millions of dollars in damages, and Fodor and the other recipients of the backdated stock  
22 options have garnered millions of dollars in unlawful profits.

23 **JURISDICTION AND VENUE**

24 4. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 in that this  
25 Complaint states a federal question. This Court has supplemental jurisdiction over the state law  
26 claims asserted herein pursuant to 28 U.S.C. § 1367(a). This action is not a collusive one to confer  
27 jurisdiction on a court of the United States which it would not otherwise have.

6. Plaintiff Irwin Berkowitz is, and was at all relevant times, a shareholder of nominal defendant Affymetrix.

8. Defendant Stephen P. A. Fodor ("Fodor") has served as the Company's Chairman since 1999, as Chief Executive Officer since 1997, and as a director since 1993.

10. Defendant Barbara A. Caulfield ("Caulfield") has served as the Company's Executive Vice President and General Counsel since July 2001.

12. Defendant Ronald D. Verdoorn (“Verdoorn”) served as the Company’s Senior Transition Team Member, Global Operations, from March 2002 to March 2003. Verdoorn also

1 served as the Company's Executive Vice President, Global Operations from November 2000 to  
2 March 2002, and as the Company's Executive Vice President, Global Manufacturing from January  
3 1999 to November 2000.

4 13. Defendant Edward M. Hurwitz ("Hurwitz") served as the Company's Senior  
5 Advisor from January 2002 to July 2002. Hurwitz also served as Senior Vice President, Corporate  
6 Strategy and New Ventures from August 2001 to October 2001, as Senior Vice President and Chief  
7 Financial Officer from October 2000 until August 2001, and as Vice President and Chief Financial  
8 Officer from May 1997 to October 2000.

9 14. Defendant Vernon A. Norviel ("Norviel") served as the Company's Senior Vice  
10 President, General Counsel and Corporate Secretary from December 1997 to in or about July 2001.  
11 Norviel also served as Vice President and General Counsel from February 1996 to December 1997.

12 15. Defendant Kenneth J. Nussbacher ("Nussbacher") has served as a Company Fellow  
13 since August 2000. Nussbacher also served as an Executive Vice President of the Company from  
14 September 1995 to 2000, as Chief Financial Officer from September 1995 to May 1997, and as a  
15 director from February 1995 to fiscal 1996.

16 16. Defendant Richard P. Rava ("Rava") has served as the Company's Head of Product  
17 Development since April 2006. Rava also served as a Company Fellow from June 2001 to April  
18 2006, as Senior Vice President and Chief Technology Officer from January 1999 to June 2001, as  
19 Senior Vice President, Operations and Technology from September 1996 to January 1999, and as  
20 Vice President, Research and Engineering from 1994 to September 1996.

21 17. Collectively, defendants Fodor, Siegel, Caulfield, Schiffman, Verdoorn, Hurwitz,  
22 Norviel, Nussbacher, and Rava are referred to herein as the "Officer Defendants."

23 18. Defendant John A. Young ("Young") has served as a director of Affymetrix since  
24 1993. Young has also served as a member of the Audit Committee of the Board ("Audit  
25 Committee") and as a member of the Compensation Committee of the Board ("Compensation  
26 Committee") since fiscal 1996.

27 19. Defendant David B. Singer ("Singer") has served as a director of Affymetrix since  
28 1993. Singer has also served as a member of the Audit Committee since fiscal 1996.

1           20. Defendant Vernon R. Loucks, Jr. ("Loucks") has served as a director of Affymetrix  
2 since 1993. Loucks has also served as a member of the Audit Committee since fiscal 2000.

3           21. Defendant John D. Diekman ("Diekman") has served as a director of Affymetrix  
4 since 1993. Diekman also served as Vice Chairman of the Board from July 1999 to December  
5 1999, as Chairman of the Board from 1993 to August 1999, and as the Company's Chief Executive  
6 Officer from July 1995 to March 1997. Diekman has also served as a member of the Audit  
7 Committee since fiscal 2000.

8           22. Collectively, defendants Young, Singer, Loucks, and Diekman are referred to herein  
9 as the "Audit Committee Defendants."

10          23. Defendant Paul Berg ("Berg") has served as a director of Affymetrix since 1993.  
11 Berg has also served as a member of the Compensation Committee since fiscal 1996.

12          24. Collectively, defendants Young and Berg are referred to herein as the  
13 "Compensation Committee Defendants."

14          25. Collectively, the Officer Defendants, Compensation Committee Defendants, and  
15 Audit Committee Defendants are referred to herein as the "Individual Defendants."

16                   **DUTIES OF THE INDIVIDUAL DEFENDANTS**

17          26. By reason of their positions as officers and/or directors of the Company and because  
18 of their ability to control the business and corporate affairs of the Company, the Individual  
19 Defendants owed the Company and its shareholders the fiduciary obligations of good faith, trust,  
20 loyalty, and due care, and were and are required to use their utmost ability to control and manage  
21 the Company in a fair, just, honest, and equitable manner. The Individual Defendants were and are  
22 required to act in furtherance of the best interests of the Company and its shareholders so as to  
23 benefit all shareholders equally and not in furtherance of their personal interest or benefit. Each  
24 director and officer of the Company owes to the Company and its shareholders the fiduciary duty  
25 to exercise good faith and diligence in the administration of the affairs of the Company and in the  
26 use and preservation of its property and assets, and the highest obligations of fair dealing.

1           27.     The Individual Defendants, because of their positions of control and authority as  
2 directors and/or officers of the Company, were able to and did, directly and/or indirectly, exercise  
3 control over the wrongful acts complained of herein.

4           28.     To discharge their duties, the officers and directors of the Company were required to  
5 exercise reasonable and prudent supervision over the management, policies, practices and controls  
6 of the Company. By virtue of such duties, the officers and directors of the Company were required  
7 to, among other things:

- 8           (a)     exercise good faith in ensuring that the affairs of the Company were conducted in an  
9                   efficient, business-like manner so as to make it possible to provide the highest  
10                  quality performance of its business;
- 11           (b)     exercise good faith in ensuring that the Company was operated in a diligent, honest  
12                   and prudent manner and complied with all applicable federal and state laws, rules,  
13                   regulations and requirements, including acting only within the scope of its legal  
14                   authority;
- 15           (c)     exercise good faith in supervising the preparation, filing and/or dissemination of  
16                   financial statements, press releases, audits, reports or other information required by  
17                   law, and in examining and evaluating any reports or examinations, audits, or other  
18                   financial information concerning the financial condition of the Company; and
- 19           (d)     exercise good faith in ensuring that the Company's financial statements were  
20                   prepared in accordance with Generally Accepted Accounting Principles ("GAAP");  
21                   and
- 22           (e)     refrain from unduly benefiting themselves and other Company insiders at the  
23                   expense of the Company.

24           29.     The Individual Defendants were responsible for maintaining and establishing  
25 adequate internal accounting controls for the Company and to ensure that the Company's financial  
26 statements were based on accurate financial information. According to GAAP, to accomplish the  
27 objectives of accurately recording, processing, summarizing, and reporting financial data, a  
28



1 corporation must establish an internal accounting control structure. Among other things, the  
2 Individual Defendants were required to:

- 3 (1) make and keep books, records, and accounts, which, in reasonable detail, accurately  
4 and fairly reflect the transactions and dispositions of the assets of the issuer; and
- 5 (2) devise and maintain a system of internal accounting controls sufficient to provide  
6 reasonable assurances that –
  - 7 (a) transactions are executed in accordance with management's general or  
8 specific authorization;
  - 9 (b) transactions are recorded as necessary to permit preparation of financial  
10 statements in conformity with [GAAP].

11 30. Affymetrix's Audit Committee Charter provides that the Audit Committee shall be  
12 responsible for, among other things,

- 13 (a) Reviewing with management and the independent registered public  
14 accounting firm the audited financial statements to be included in the  
15 Company's Annual Report on Form 10-K (or the annual report to  
16 stockholders if distributed prior to the filing of Form 10-K), including their  
17 judgments about the quality, not just acceptability, of accounting principles,  
18 the reasonableness of significant judgments, and the clarity of disclosures in  
19 the financial statements. The committee shall recommend to the Board  
20 whether, based on the discussions and reviews outlined above, the financial  
21 statements should be included in the annual report and the Form 10-K;
- 22 (b) Discussing the results of the annual audit and any other matters required to  
23 be communicated to the committee by the independent registered public  
24 accounting firm under generally accepted standards including SAS 61. The  
25 committee shall have the opportunity to meet as often as may be deemed  
26 necessary or appropriate in its judgment with the independent registered  
27 public accounting firm in a private session without management present to  
28 discuss the results of their annual audit;

- 1 (c) Reviewing with management and the independent registered public  
 2 accounting firm the interim financial statements in the Company's Quarterly  
 3 Reports on Form 10-Q prior to their filing with the SEC. Also, the  
 4 committee shall discuss the results of the quarterly review and any other  
 5 matters required to be communicated to the committee by the independent  
 6 registered public accounting firm under generally accepted auditing  
 7 standards. The chair of the committee may represent the entire committee for  
 8 the purpose of this review; and
- 9 (d) Reviewing and discussing with management and the auditors a report from  
 10 the auditors of (a) all critical accounting policies and practices to be used by  
 11 the Company; (b) all alternative accounting treatments of financial  
 12 information permitted within GAAP for policies and practices related to  
 13 material items that have been discussed with management, including the  
 14 ramifications of using such alternative treatments and disclosures and the  
 15 treatment preferred by the independent registered public accounting firm; (c)  
 16 any accompanying management letters, schedules of unreported differences  
 17 or other material written communications between the independent  
 18 registered public accounting firm and management; (d) any significant  
 19 changes in the accounting policies and practices of the Company; and (e) any  
 20 accounting and financial reporting proposals that may have a significant  
 21 impact on the Company's financial reports.

## 22 **FACTUAL ALLEGATIONS**

### 23 **Stock Option Grants to the Officer Defendants**

24 31. At all times relevant hereto the Compensation Committee determined the salaries,  
 25 incentive compensation, and stock option awards for executive officers of Affymetrix and  
 26 administered the Company's stock option plans.

27 32. From 1998 to 2002, the Compensation Committee granted certain Affymetrix stock  
 28 options to the Officer Defendants, as follows:



| <u>Officer</u> | <u>Purported<br/>Date of<br/>Grant</u> | <u>Exercise<br/>Price</u> | <u>Number<br/>of Options</u> |
|----------------|--|---------------------------|------------------------------|
| Fodor          | 6/30/99                                | \$48.8750                 | 150,000                      |
|                | 10/2/00                                | \$47.8516                 | 300,000                      |
| Siegel         | 10/15/98                               | \$21.2813                 | 100,000                      |
|                | 6/30/99                                | \$48.8750                 | 50,000                       |
|                | 10/2/00                                | \$47.8516                 | 200,000                      |
|                | 6/12/02                                | \$20.855                  | 200,000                      |
| Caulfield      | 7/23/01                                | \$19.335                  | 350,000                      |
| Schiffman      | 10/30/01                               | \$29.7550                 | 50,000                       |
| Verdoorn       | 1/10/99                                | \$28.0625                 | 200,000                      |
|                | 10/2/00                                | \$47.8516                 | 100,000                      |
| Hurwitz        | 10/2/00                                | \$47.8516                 | 60,000                       |
| Norviel        | 10/2/00                                | \$47.8516                 | 60,000                       |
| Nussbacher     | 6/30/99                                | \$48.8750                 | 100,000                      |
| Rava           | 6/30/99                                | \$48.8750                 | 100,000                      |

33. Pursuant to the terms of the Company's shareholder-approved stock option plans, the exercise price of the options must be no less than the closing price of Affymetrix stock on the date of grant.

34. Pursuant to APB 25, the applicable GAAP provision at the time of the foregoing stock option grants, if the market price on the date of grant exceeds the exercise price of the options, the company must recognize the difference as an expense.

35. Pursuant to Section 162(m) of the Internal Revenue Code, 26 U.S.C. § 162(m) ("Section 162(m)"), compensation in excess of \$1 million per year, including gains on stock options, paid to a corporation's five most highly-compensated officers is tax deductible only if: (i) the compensation is payable solely on account of the attainment of one or more performance goals; (ii) the performance goals are determined by a compensation committee comprised solely of two or more outside directors, (iii) the material terms under which the compensation is to be paid,

including the performance goals, are disclosed to shareholders and approved by a majority of the vote in a separate shareholder vote before the payment of the compensation, and (iv) before any payment of such compensation, the compensation committee certifies that the performance goals and any other material terms were in fact satisfied.

36. In a striking pattern that could not have been the result of chance, each and every one of the foregoing stock option grants was dated just after a sharp drop and just before a substantial rise in Affymetrix's stock price, as demonstrated in the following chart:

**Summary of Option Grants and Surrounding Stock Price Performance**

| <u>Purported<br/>Date of<br/>Grant</u> | <u>Exercise<br/>Price</u> | <u>Stock Price 10<br/>Trading Days<br/>Before Grant</u> | <u>Stock Price 10<br/>Trading Days<br/>After Grant</u> | <u>% Rise in<br/>Stock Price<br/>After Grant</u> |
|--|---------------------------|---|--|--|
| 10/15/98                               | \$21.2813                 | \$24.8125   | \$25.50  | 19.8%  |
| 1/10/99                                | \$28.0625                 | \$24.375  | \$36.50  | 30.1%  |
| 6/30/99                                | \$48.8750                 | \$45.25   | \$80.00  | 63.7%  |
| 10/2/00                                | \$47.8516                 | \$60.625  | \$59.875   | 25.1%  |
| 7/23/01                                | \$19.335                  | \$21.89   | \$23.66  | 22.4%  |
| 10/30/01                               | \$29.7550                 | \$20.20   | \$32.74  | 10.0%  |
| 6/12/02                                | \$20.855                  | \$25.13   | \$22.50  | 7.9%   |

37. The reason for the extraordinary pattern set forth in the preceding paragraph is that the purported grant dates set forth therein were not the actual dates on which the stock option grants were made. Rather, at the behest of the Officer Defendants, the Committee Defendants improperly backdated the stock option grants to make it appear as though the grants were made on dates when the market price of Affymetrix stock was lower than the market price on the actual grant dates. This improper backdating, which violated the terms of the Company's shareholder-approved stock option plans, resulted in option grants with lower exercise prices, which improperly increased the value of the options to the Officer Defendants and improperly reduced the amounts the Officer Defendants had to pay the Company upon exercise of the options.

**Dissemination of False Financial Statements**

38. As a result of the improper backdating of stock options, the Company, with the knowledge, approval, and participation of each of the Individual Defendants,

(a) violated the terms of the Company's shareholder-approved stock option plans;

- (b) violated GAAP by failing to recognize compensation expenses incurred when the improperly backdated options were granted;
- (c) violated Section 162(m) by taking tax deductions based on stock option grants that were not payable solely on account of the attainment of one or more performance goals and violated the terms of the Company's shareholder-approved stock option plans; and
- (d) produced and disseminated to Affymetrix shareholders and the market false financial statements that improperly recorded and accounted for the backdated option grants.

39. The Company, with the knowledge, approval, and participation of each of the Individual Defendants, disseminated its false financial statements in, *inter alia*, the following Form 10-K filings:

- (a) Form 10-K405 for the year ended December 31, 1998, filed with the SEC on March 31, 1999 and signed by defendants Fodor, Hurwitz, Diekman, Berg, Loucks, Singer, and Young;
- (b) Form 10-K405 for the year ended December 31, 1999, filed with the SEC on March 30, 2000 and signed by defendants Fodor, Hurwitz, Diekman, Berg, Loucks, Singer, and Young;
- (c) Form 10-K405 for the year ended December 31, 2000, filed with the SEC on March 30, 2001 and signed by defendants Fodor, Hurwitz, Diekman, Berg, Loucks, Singer, and Young;
- (d) Form 10-K405 for the year ended December 31, 2001, filed with the SEC on March 29, 2002 and signed by defendants Fodor, Schiffman, Diekman, Berg, Loucks, Singer, and Young;
- (e) Form 10-K for the year ended December 31, 2002, filed with the SEC on March 31, 2003 and signed by defendants Fodor, Schiffman, Diekman, Berg, Loucks, Siegel, Singer, and Young.

1           40. Furthermore, from 2000 to 2003, the Company, with the knowledge, approval, and  
 2 participation of each of the Individual Defendants, for the purpose and with the effect of concealing  
 3 the improper option backdating, disseminated to shareholders and filed with the SEC annual proxy  
 4 statements that falsely reported the dates of stock option grants to the Officer Defendants.

5           41. On August 9, 2006, Affymetrix announced that an internal investigation had  
 6 discovered "irregularities" related to the issuance of certain stock option grants made between 1997  
 7 and 1999. Specifically, the Company stated:

8           Affymetrix, Inc. announced that as a result of its previously announced  
 9 internal review into historical stock option granting practices it will restate  
 10 its financial statements for certain options granted between 1997 and 1999.  
 11 The review identified certain documentation lapses but did not find any  
 pattern or practice of inappropriately identifying grant dates with hindsight  
 in order to provide "discounted" or "in-the-money" grants.

12           The restatement is currently expected to reflect additional non-cash  
 13 compensation expense from 1997 to 2003, the vesting period of the options.  
 14 The restatement is also expected to reflect a tax benefit arising from this  
 15 stock compensation expense. This tax benefit will be recorded in 2005, the  
 year in which the company reduced its valuation allowance for certain  
 deferred tax assets. The result will be to increase the company's previously  
 reported net losses from 1997 to 2002, reduce previously reported net  
 income for 2003, and increase its previously reported net income in 2005.

16           Affymetrix expects to file restated financial statements for the affected  
 17 periods with the Securities and Exchange Commission during the current  
 18 quarter. The company has filed a Form 12b-25 with the SEC indicating that  
 19 its Form 10-Q for the quarter ended June 30, 2006 will not be filed on  
 20 schedule. As a result of the restatement, the financial statements contained in  
 the Company's Form 10-K for the year ended December 31, 2005 and its  
 Form 10-Q for the quarter ended March 31, 2006 should no longer be relied  
 upon.

#### 21           **THE INDIVIDUAL DEFENDANTS' BREACHES OF FIDUCIARY DUTIES**

22           42. The Officer Defendants breached their fiduciary duties by:

- 23           (a) colluding with the Compensation Committee Defendants to backdate stock  
 24 option grants;
- 25           (b) colluding with the Audit Committee Defendants to violate GAAP and  
 26 Section 162(m);
- 27           (c) colluding with the other Individual Defendants to produce and disseminate  
 28 to Affymetrix shareholders and the market false financial statements that

1 improperly recorded and accounted for the backdated option grants and  
2 concealed the improper backdating of stock options; and

- 3 (d) colluding with the other Individual Defendants to file false proxy statements  
4 and false financial statements in order to conceal the improper backdating of  
5 stock options.

6 43. The Officer Defendants' foregoing misconduct was not, and could not have been, an  
7 exercise of good faith business judgment. Rather, it was intended to, and did, unduly benefit the  
8 Officer Defendants at the expense of the Company.

9 44. The Compensation Committee Defendants breached their fiduciary duties by:

- 10 (a) colluding with the Officer Defendants to backdate stock option grants;  
11 (b) colluding with the Officer Defendants and Audit Committee Defendants to  
12 violate GAAP and Section 162(m);  
13 (c) colluding with the other Individual Defendants to produce and disseminate  
14 to Affymetrix shareholders and the market false financial statements that  
15 improperly recorded and accounted for the backdated option grants and  
16 concealed the improper backdating of stock options; and  
17 (d) colluding with the other Individual Defendants to file false proxy statements  
18 and false financial statements in order to conceal the improper backdating of  
19 stock options.

20 45. The Compensation Committee Defendants' foregoing misconduct was not, and  
21 could not have been, an exercise of good faith business judgment. Rather, it was intended to, and  
22 did, unduly benefit the Officer Defendants at the expense of the Company.

23 46. The Audit Committee Defendants breached their fiduciary duties by:

- 24 (a) colluding with the Officer Defendants to violate GAAP and Section 162(m);  
25 (b) colluding with the other Individual Defendants to produce and disseminate  
26 to Affymetrix shareholders and the market false financial statements that  
27 improperly recorded and accounted for the backdated option grants and  
28 concealed the improper backdating of stock options; and

1 (c) colluding with the other Individual Defendants to file false proxy statements  
2 and false financial statements in order to conceal the improper backdating of  
3 stock options.

4 47. The Audit Committee Defendants' foregoing misconduct was not, and could not  
5 have been, an exercise of good faith business judgment. Rather, it was intended to, and did, unduly  
6 benefit the Officer Defendants at the expense of the Company.

7 48. As a direct and proximate result of the Individual Defendants' foregoing breaches of  
8 fiduciary duties, the Company has sustained millions of dollars in damages, including, but not  
9 limited to, the additional compensation expenses and tax liabilities the Company was required to  
10 incur and loss of funds paid to the Company upon exercise of options.

11 **DERIVATIVE AND DEMAND EXCUSED ALLEGATIONS**

12 49. Plaintiff brings this action derivatively in the right and for the benefit of the  
13 Company to redress defendants' breaches of fiduciary duties and unjust enrichment.

14 50. Plaintiff is an owner of Affymetrix common stock and was an owner of Affymetrix  
15 common stock at all times relevant hereto.

16 51. Plaintiff will adequately and fairly represent the interests of the Company and its  
17 shareholders in enforcing and prosecuting its rights.

18 52. As a result of the facts set forth herein, Plaintiff has not made any demand on the  
19 Affymetrix Board of Directors to institute this action against the Individual Defendants. Such  
20 demand would be a futile and useless act because the Board is incapable of making an independent  
21 and disinterested decision to institute and vigorously prosecute this action.

22 53. The Board currently consists of nine directors: defendants Fodor, Diekman, Berg,  
23 Loucks, Siegel, Singer, and Young, and directors Susan Desmond-Hellmann and Robert H. Trice.  
24 The following directors are incapable of independently and disinterestedly considering a demand to  
25 commence and vigorously prosecute this action:

26 (a) Fodor and Siegel, because they are directly interested in the improperly backdated  
27 stock option grants complained of herein;  
28



- 1 (b) Berg and Young, because as members of the Compensation Committee they directly  
2 participated in and approved the improper backdating of stock options, as alleged  
3 herein. Moreover, by colluding with the Officer Defendants and others, as alleged  
4 herein, Berg and Young have demonstrated that they are unable or unwilling to act  
5 independently of the Officer Defendants;
- 6 (c) Young, Singer, Loucks, and Diekman, because as members of the Audit Committee  
7 they directly participated in and approved the Company's violations of GAAP and  
8 Section 162(m), as alleged herein. Moreover, by colluding with the Officer  
9 Defendants and others, as alleged herein, Young, Singer, Loucks, and Diekman  
10 have demonstrated that they are unable or unwilling to act independently of the  
11 Officer Defendants; and
- 12 (d) Fodor, Diekman, Berg, Loucks, Siegel, Singer, and Young, because as directors of  
13 the Company they directly participated in and approved the Company's filing of  
14 false financial statements and other SEC filings, as alleged herein. Moreover, by  
15 colluding with the Officer Defendants and others, as alleged herein, Fodor,  
16 Diekman, Berg, Loucks, Siegel, Singer, and Young have demonstrated that they are  
17 unable or unwilling to act independently of the Officer Defendants.

18 54. Furthermore, demand is excused because the misconduct complained of herein was  
19 not, and could not have been, an exercise of good faith business judgment.

20 **COUNT I**

21 **AGAINST THE INDIVIDUAL DEFENDANTS**  
22 **FOR BREACH OF FIDUCIARY DUTY**

23 55. Plaintiff incorporates by reference all preceding and subsequent paragraphs as if set  
24 forth fully herein.

25 56. As alleged in detail herein, each of the Individual Defendants had a fiduciary duty to  
26 refrain from unduly benefiting themselves and other Company insiders at the expense of the  
27 Company.  
28

1           57. As alleged in detail herein, the Officer Defendants breached their fiduciary duties  
2 by:

- 3           (a) colluding with the Compensation Committee Defendants to backdate stock  
4 option grants;
- 5           (b) colluding with the Audit Committee Defendants to violate GAAP and  
6 Section 162(m);
- 7           (c) colluding with the other Individual Defendants to produce and disseminate  
8 to Affymetrix shareholders and the market false financial statements that  
9 improperly recorded and accounted for the backdated option grants and  
10 concealed the improper backdating of stock options; and
- 11           (d) colluding with the other Individual Defendants to file false proxy statements  
12 and false financial statements in order to conceal the improper backdating of  
13 stock options.

14           58. The Officer Defendants' foregoing misconduct was not, and could not have been, an  
15 exercise of good faith business judgment. Rather, it was intended to, and did, unduly benefit the  
16 Officer Defendants at the expense of the Company.

17           59. As alleged in detail herein, the Compensation Committee Defendants breached their  
18 fiduciary duties by:

- 19           (a) colluding with the Officer Defendants to backdate stock option grants;
- 20           (b) colluding with the Officer Defendants and Audit Committee Defendants to  
21 violate GAAP and Section 162(m);
- 22           (c) colluding with the other Individual Defendants to produce and disseminate  
23 to Affymetrix shareholders and the market false financial statements that  
24 improperly recorded and accounted for the backdated option grants and  
25 concealed the improper backdating of stock options; and
- 26           (d) colluding with the other Individual Defendants to file false proxy statements  
27 and false financial statements in order to conceal the improper backdating of  
28 stock options.

60. The Compensation Committee Defendants' foregoing misconduct was not, and could not have been, an exercise of good faith business judgment. Rather, it was intended to, and did, unduly benefit the Officer Defendants at the expense of the Company.

61. As alleged in detail herein, the Audit Committee Defendants breached their fiduciary duties by:

- (a) colluding with the Officer Defendants to violate GAAP and Section 162(m);
- (b) colluding with the other Individual Defendants to produce and disseminate to Affymetrix shareholders and the market false financial statements that improperly recorded and accounted for the backdated option grants and concealed the improper backdating of stock options; and
- (c) colluding with the other Individual Defendants to file false proxy statements and false financial statements in order to conceal the improper backdating of stock options.

62. The Audit Committee Defendants' foregoing misconduct was not, and could not have been, an exercise of good faith business judgment. Rather, it was intended to, and did, unduly benefit the Officer Defendants at the expense of the Company.

63. As a direct and proximate result of the Individual Defendants' foregoing breaches of fiduciary duties, the Company has sustained millions of dollars in damages, including, but not limited to, the additional compensation expenses and tax liabilities the Company was required to incur and loss of funds paid to the Company upon exercise of options.

## COUNT II

### **AGAINST THE INDIVIDUAL DEFENDANTS FOR VIOLATION OF SECTION 10(b) OF THE SECURITIES EXCHANGE ACT AND RULE 10b-5 PROMULGATED THEREUNDER**

64. Plaintiff incorporates by reference all preceding and subsequent paragraphs as if set forth fully herein.

65. Each of the Individual Defendants intentionally or recklessly employed devices, schemes, and artifices to defraud and engaged in acts, practices, and a course of business which operated as a fraud and deceit upon the Company.

67. As a direct and proximate result of the Individual Defendants' fraud the Company has sustained millions of dollars in damages, including, but not limited to, the additional compensation expenses and tax liabilities the Company was required to incur and loss of funds paid to the Company upon exercise of options.

**AGAINST THE OFFICER DEFENDANTS  
FOR COMMON LAW RESTITUTION/UNJUST ENRICHMENT**

69. The Officer Defendants were unjustly enriched by their receipt and retention of backdated stock option grants, as alleged herein, and it would be unconscionable to allow them to retain the benefits thereof.

70. To remedy the Officer Defendants' unjust enrichment, the Court should order them to disgorge to the Company all of the backdated stock options they received, including the proceeds of any such options that have been exercised, sold, pledged, or otherwise monetized.

WHEREFORE, Plaintiff demands judgment as follows:

- A. Against all of the Individual Defendants and in favor of the Company for the amount of damages sustained by the Company as a result of the Individual Defendants' breaches of fiduciary duties and statutory violations;
- B. Ordering the Officer Defendants to disgorge to the Company all of the backdated stock options they received, including the proceeds of any such options that have been exercised, sold, pledged, or otherwise monetized;
- C. Granting appropriate equitable relief to remedy Defendants' breaches of fiduciary duties;

D. Awarding to plaintiff the costs and disbursements of the action, including reasonable attorneys' fees, accountants' and experts' fees, costs, and expenses; and

E. Granting such other and further relief as the Court deems just and proper.

**JURY TRIAL DEMANDED**

Plaintiff demands a trial by jury.

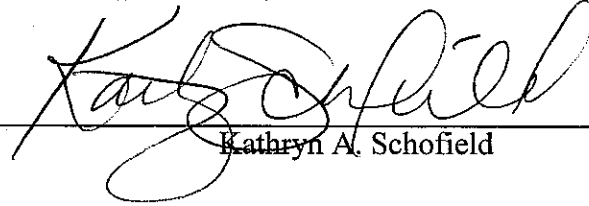
**CERTIFICATION OF INTEREST ENTITIES OR PERSONS**

Pursuant to Civil Local Rule 3-16, the undersigned certifies that as of this date, other than the named parties there is no such interest to report.

Respectfully submitted,

Dated: August 30, 2006

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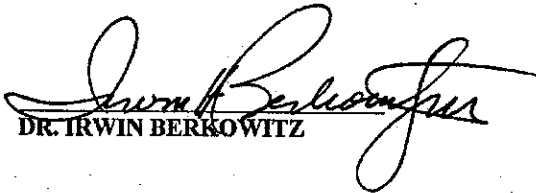
Attorneys for Plaintiff

**VERIFICATION**

I, **Dr. Irwin Berkowitz**, hereby verify that I have reviewed the Complaint and authorized its filing and that the foregoing is true and correct to the best of my knowledge, information and belief.

I verify under penalty of perjury that the foregoing is true and correct.

DATE: 8/27/06

  
DR. IRWIN BERKOWITZ